In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-148

NORMAN ROTHMAN and FABIO DOMENICO DECRISTOFARO, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

After a jury trial in the United States District Court for the Southern District of New York, petitioners were convicted of conspiring and knowingly transporting stolen securities in interstate commerce, in violation of 18 U.S.C. 371 and 2314, and of possessing securities known to have been stolen from interstate commerce and the mail, in violation of 18 U.S.C. 659 and 1708. Petitioner Rothman (who was convicted on seven counts) was sentenced to concurrent prison terms of five years; petitioner DeCristo-

faro (who was convicted on three counts) received concurrent terms of three years. The court of appeals affirmed (Pet. App. A 1-6).

1. Petitioners do not dispute the sufficiency of the evidence. They contend that it was error for the prosecutor, in his opening statement, to mention the fact that two co-defendants who were to testify as government witnesses had pleaded guilty to conspiring with petitioners, and for the trial judge, following the testimony of the two co-defendants indicating that they had pleaded guilty, to fail *sua sponte* to give an instruction that such pleas could not be considered as bearing on petitioners' guilt. These contentions are adequately answered in the opinion below on which we rely (Pet. App. A 3-5). We point out in addition that the cases relied on by petitioners (Pet. 14) as standing for the proposition that refusal to give an unrequested instruction with respect to the guilty pleas of co-defendants is plain error do not so hold. On the contrary, the decisions dealing with this precise issue uniformly hold that the failure to give a cautionary instruction in these circumstances is not plain error. *United States* v. *King*, 420 F. 2d 946, 947 (C.A. 4), certiorari denied, 397 U.S. 1017; *United States* v. *Kimbrew*, 380 F. 2d 538, 540 (C.A. 6).

2. Petitioner Rothman makes an additional claim that it was a denial of his Fourth and Fifth Amendment rights for the district court to require him on the day of trial, but before the jury was empaneled, to furnish handwriting exemplars which were sub-

sequently introduced into evidence. All of petitioner Rothman's constitutional contentions raised below have been resolved against him by this Court.

The point is made that this was a "critical stage" in the proceedings, but we note first that petitioners were represented by counsel at the time. In any event, as the court of appeals pointed out (Pet. App. A 6), this Court rejected petitioner's implied Sixth Amendment claim in *Gilbert* v. *California*, 388 U.S. 263, 267:

> * * * The taking of the exemplars was not a "critical stage" of the criminal proceedings entitling petitioner to the assistance of counsel. Putting aside the fact that the exemplars were taken before the indictment and appointment of counsel, there is minimal risk that the absence of counsel might derogate from his right to a fair trial. Cf. *United States* v. *Wade*, *supra*. If, for some reason, an unrepresentative exemplar is taken, this can be brought out and corrected through the adversary process at trial since the accused can make an unlimited number of additional exemplars for analysis and comparison by government and defense handwriting experts. * * *[1]

[1] Although the Court noted that the exemplars there were taken before indictment, it did not rest its decision on this fact but on the rationale that the taking of exemplars is not a "critical stage" in terms of the Sixth Amendment right to counsel since there is no meaningful role for counsel to play. See also *United States* v. *Izzi*, 427 F. 2d 293, 295 (C.A. 2), certiorari denied, 399 U.S. 928, where the Second Circuit upheld the use of exemplars, taken, as in this case, after indictment.

Gilbert also squarely rejected the argument based upon the Fifth Amendment privilege, pointing out (*id.* at 266-267) that:

> The privilege reaches only compulsion of "an accused's communications, whatever form they might take, and the compulsion of responses which are also communications, for example, compliance with a subpoena to produce one's papers," and not "compulsion which makes a suspect or accused the source of 'real or physical evidence' . . . ." *Schmerber* v. *California*, 384 U.S. 757, 763-764. * * * A mere handwriting exemplar, in contrast to the content of what is written, like the voice or body itself, is an identifying physical characteristic outside [the protection of the privilege]. * * *

Petitioner Rothman's Fourth Amendment claim was not raised in the district court or in the court of appeals either in petitioners' main brief (Pet. App. D, pp. 22, 35-36) or in the petition for rehearing (Pet. App. C, pp. 16-19). Only the Fifth Amendment privilege against self-incrimination formed the basis of petitioner Rothman's objections below. Contentions as to unreasonable search and seizure are normally waived if not raised prior to trial. *Nardone* v. *United States*, 308 U.S. 338, 341-342; *Segurola* v. *United States*, 275 U.S. 106, 111-112. This is particularly true where the alleged error could have been cured had a timely objection been made. *Chew* v. *United States*, 298 F. 2d 334 (C.A. D.C.); *United States* v. *Sten*, 342 F. 2d 491, 493 (C.A. 2); *United States* v. *Mitchell*, 432 F. 2d 354, 356 (C.A. 1).

Although it is not here conceded that the Fourth Amendment extends to the taking of handwriting exemplars, if the issue had been raised, the government could have made any necessary showing by pointing out (1) that the indictment established probable cause to believe petitioners were guilty of the offenses charged (*Ex parte United States*, 287 U.S. 241, 250); (2) that a material issue existed as to the authorship of certain signatures on cashier's checks and hotel registration cards; and (3) that identifying the handwriting on such checks and registration cards constituted part of the government's attempt to establish petitioner's participation in the commission of the offenses.[2] Thus, petitioner Rothman was properly ordered by the district court to provide the handwriting exemplars.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

AUGUST 1972.

---

[2] Since the question was not raised in the lower courts, the decision below cannot be said to conflict with *In re Dionisio*, 442 F. 2d 276 (C.A. 7), certiorari granted May 30, 1972, *sub nom. United States* v. *Dionisio* (No. 71-229), and *Mara* v. *United States*, 454 F. 2d 580 (C.A. 7), certiorari granted May 30, 1972 (No. 71-850). Those decisions of the Seventh Circuit held that the Fourth Amendment imposes on the government the burden of showing "reasonableness" to justify a grand jury subpoena and court order that a witness execute handwriting exemplars.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1972 474909 100